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No. 92-329

In The

Supreme Court of the United States

October Term, 1992

RICHARD A. HEILPRIN,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

Respondent.

Petition for a Writ of Certiorari
to the Wisconsin Supreme Court

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

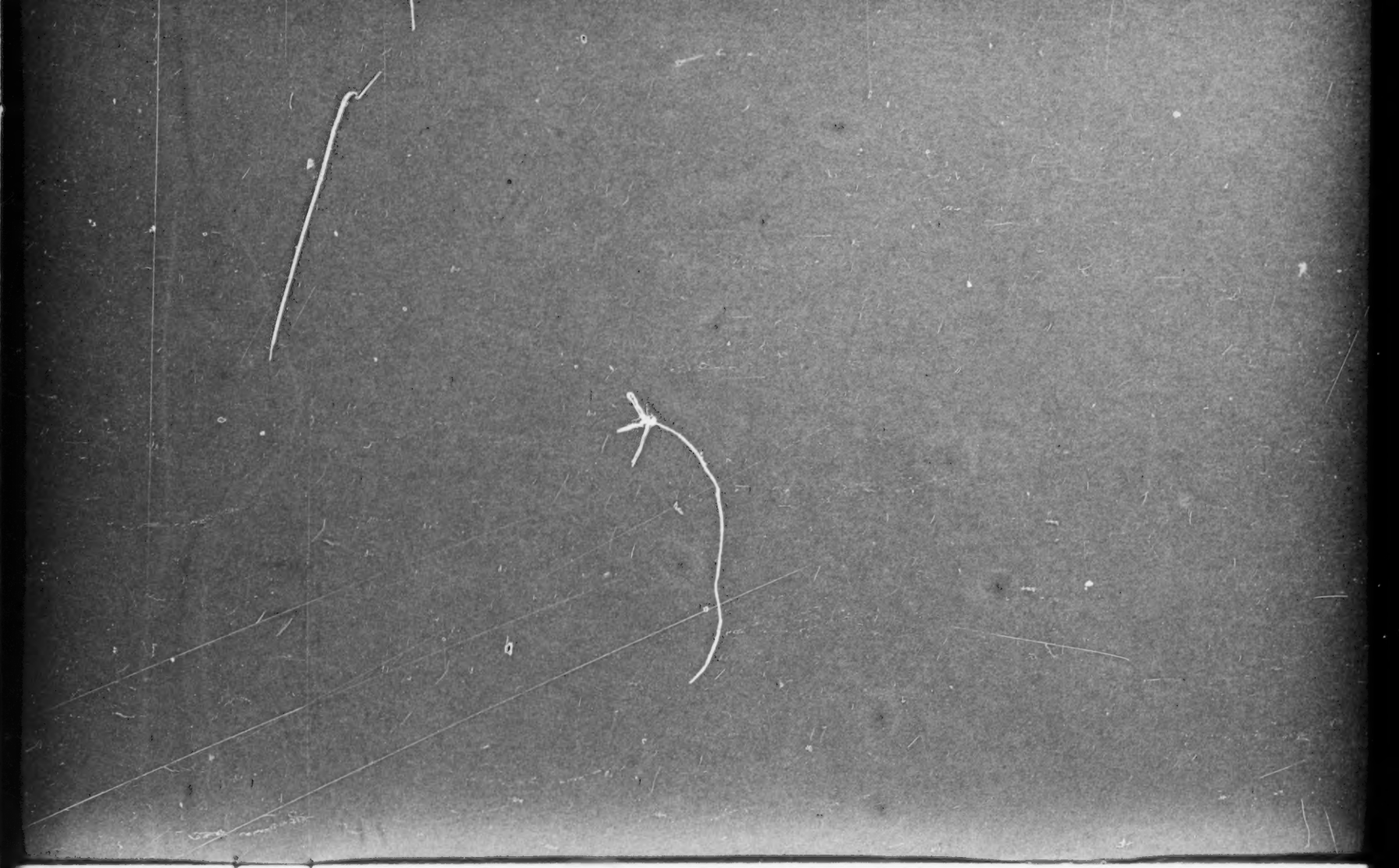
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QUESTIONS PRESENTED

1. Was the revocation of petitioner's license to practice law a violation of the Due Process Clause of the Fourteenth Amendment when the complaint filed with the Wisconsin Supreme Court alleged that petitioner directed sexually explicit and suggestive comments and questions to two women clients during office conferences in the course of the attorney/client relationship, those facts were proved, but the Wisconsin Supreme Court revoked petitioner's license based on the standard of conduct enunciated in *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973), rather than the "offensive personality" standard of the attorney's oath?

2. Is the standard of conduct for which petitioner's license was revoked so vague as to be unconstitutional?

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INTRODUCTION

The respondent, Wisconsin Board of Attorneys Professional Responsibility, respectfully requests this Court deny the petition for writ of certiorari requesting review of the May 5, 1992, decision and order of the Wisconsin Supreme Court, revoking the petitioner's license to practice law in Wisconsin, *Disciplinary Proceedings Against Heilprin*, 168 Wis. 2d 1, 482 N.W.2d 908 (1992), for directing sexually explicit and suggestive comments and questions to two women clients during office conferences in the course of an attorney/client relationship.

STATEMENT OF THE CASE

Respondent filed a complaint against the petitioner alleging that on two occasions with different female clients petitioner had directed sexually explicit and suggestive comments to them in office conferences during the course of the attorney/client relationship. In the case of Mrs. Tate, one of the clients, the petitioner directed sexually explicit comments to her on two occasions and made such comments in her presence on a third occasion.[1] In the case of Mrs. McSherry, the second client, on two occasions petitioner directed sexually explicit comments at Mrs. McSherry.[2] A third count also alleged that petitioner had represented a client in a conflict of interest situation. Respondent maintained that directing sexually explicit comments to female clients violated the attorney's oath which admonishes attorneys to refrain from "offensive personality." Wis. SCR 20:8.4(g) states:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (g) violate the attorney's oath.

Respondent also maintained that the conflict of interest allegation violated Wis. SCR 20:1.7(b).

On March 12, 1990, petitioner filed his answer and a motion to dismiss. Petitioner raised a number of affirmative defenses, including that the "offensive personality" standard of the attorney's oath was vague and

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[1] The specifics of the Tate complaint are set forth in the report of the referee (P-Ap. 73-76).

[2] The particulars of the comments to Mrs. McSherry appear in the report of the referee (P-Ap. 79-80).

therefore unconstitutional. He also denied specifically that he had made the comments alleged to the two female clients.

Pursuant to Wisconsin Supreme Court rules, the Wisconsin Supreme Court appointed a referee to hear evidence and submit a report. The referee heard evidence in a two-and-one-half-day trial, decided preliminary issues including the challenge that the "offensive personality" standard of the attorney's oath was unconstitutionally vague. The referee specifically addressed in his report the issue of credibility between petitioner and the two female clients. The referee found for the petitioner on the third count.

The Wisconsin Supreme Court revoked the petitioner's license on the basis of Wis. SCR 20:8.4(f) rather than (g). Rule 20:8.4(f) provides:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers.

Petitioner had previously been disciplined, in part upon sexual comments and touching of female clients. *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973). The Wisconsin Supreme Court observed in the present case:

> We adopt the referee's findings of fact concerning Attorney Heilprin's conduct but, contrary to the referee's conclusion of law that such conduct violated the Attorney's Oath, we conclude that it violated that very standard of attorney professional conduct we

> enunciated in 1973 in a case involving this same attorney, *Disciplinary Proceedings Against Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878. There, the court suspended Attorney Heilprin's license for . . . his having talked obscenely, made indecent gestures, indecently exposed himself and made indecent sexual proposals to two women clients.

Disciplinary Proceedings Against Heilprin, 168 Wis. 2d at 2, 482 N.W.2d at 908. The Wisconsin Supreme Court ordered petitioner's license to practice law in Wisconsin revoked and entered further orders concerning the payment of costs and notification of clients and courts as provided in Wis. SCR 22.26.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner contends that by finding his conduct of directing sexually explicit and suggestive comments and questions to two female clients to have violated Wis. SCR 20:8.4(f) rather than Wis. SCR 20:8.4(g), the Wisconsin Supreme Court violated due process as first enunciated in *In re Ruffalo*, 390 U.S. 544 (1968). In *Ruffalo*, this Court concluded that Ruffalo had been denied due process in his disciplinary proceeding because the process in that case was a trap. Ruffalo had been charged with

hiring another to solicit clients. He testified in his own behalf that he had actually hired an employee of a railroad to investigate potential cases against that railroad. The Ohio Supreme Court then disciplined Ruffalo for hiring someone to perform services in conflict with the interests of his main employer.

The Court in *Ruffalo* held that attorneys have a due process right to know the charge against them so they could adequately defend themselves. In *Ruffalo*, the attorney did not know that the hiring of an investigator to investigate claims against his main employer was alleged to have been prohibited conduct. Moreover, the conduct of hiring an investigator was not the type of conduct which would be obviously improper to a scrupulous person.

In this case, petitioner had notice of the factual allegations which the respondent claimed constituted misconduct. The Due Process Clause requires no more. Decisions in state supreme court cases bear out the statement of the Kansas Supreme Court that

> The complaint is sufficient where it sets out the facts which underlie the charges of misconduct and places the attorney on notice as to what ethical violations might arise therefrom. The complaint need not contain an explicit reference to the specific disciplinary rules which might have been violated by the attorney.

In re Farmer, 242 Kan. 296, 300, 747 P.2d 97, 100 (1987). *See also In re Wright*, 131 Vt. 473, 310 A.2d 1 (1973); *Attorney Grievance Commission v. McBurney*, 282 Md. 116, 383 A.2d 58 (1978).

In this case, the conduct that petitioner was found to have committed was the very same conduct alleged in

the complaint and for which discipline was imposed: directing sexually explicit and suggestive comments to female clients. The "charge" did not alter from the complaint to the hearing to the Wisconsin Supreme Court decision. Only the reasoning or, as characterized by the Wisconsin Supreme Court, the conclusion of law changed. The disciplinary action imposed was imposed for the conduct charged, albeit under a different theory.

Unlike *Ruffalo* there was no trap to ensnare petitioner. He was aware of the alleged factual basis for the misconduct. The respondent presented evidence that the incidents had occurred. Petitioner presented evidence that they had not occurred. The referee resolved the conflict in evidence against the petitioner. Petitioner was not disciplined based solely on evidence he presented which he thought was a defense to the alleged misconduct. He was disciplined for committing the conduct which the respondent alleged he had committed. Petitioner knew that the issue in this case was whether or not he had directed sexually explicit and suggestive comments to two of his female clients. He defended on that basis. Although the Wisconsin Supreme Court used a different "theory" than the respondent, the difference was simply not significant from a constitutional point of view.

Nor did petitioner suffer any prejudice as the result of this change in theory. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655 n.18 (1985), this Court differentiated *Ruffalo* because "the variance between the theory of the Office of Disciplinary Counsel and the Board of Bar Commissioners had no such prejudicial effect on appellant." No prejudicial effect is present in this case. Petitioner does not even suggest how holding that he violated a standard of conduct that had been enunciated by the Wisconsin Supreme Court in a case against him in 1973 would have caused him to present a different defense than he presented.

The definiteness and certainty required by due process is such definiteness and certainty as will enable a presumptively innocent man to prepare for trial. *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984). A presumptively innocent man alleged to have committed the acts which petitioner committed would have prepared exactly the same whether the initial allegation had been under Wis. SCR 20:8.4(f), violation of the standard of conduct in *State v. Heilprin*, or Wis. SCR 20:8.4(g), "offensive personality" standard of the attorney's oath.

Nor can petitioner claim he was unaware that this type of conduct could result in the loss of his license. As observed by Justices White and Marshall in *Ruffalo*, members of the bar can be "assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment." 390 U.S. at 555. All attorneys should be aware that the type of comments which petitioner was found to have made to female clients are improper for members of the bar. Certainly, petitioner, who had been previously disciplined in part for very similar conduct, should have been aware that his conduct could result in his discipline, including disbarment.

The Wisconsin Supreme Court did not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution by revoking petitioner's license.

II. NEITHER "OFFENSIVE PERSONALITY" NOR THE STANDARD OF CONDUCT IN *STATE v. HEILPRIN* IS SO VAGUE AS TO BE UNCONSTITUTIONAL.

Petitioner contends that the language of the "attorney's oath" proscribing "offensive personality" is unconstitutionally vague. The simple answer to this contention is that the Wisconsin Supreme Court did not discipline petitioner for "offensive personality;" but, even if they had or petitioner had claimed before this Court that the standard of conduct in *State v. Heilprin* is similarly vague, it avails him nothing.

Due process does not require that a rule contain an explicit definition of every term. All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 14 (1857). As this Court observed in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578–79 (1973):

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." United States v.

> Harriss, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

And in *Colten v. Kentucky*, 407 U.S. 104 (1972), this Court stated:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing [rules] both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id. at 110.

As pointed out by Justices White and Marshall in their concurring opinion in *Ruffalo*, the type of conduct at issue here is certainly conduct that responsible attorneys will recognize to be grounds for disbarment. What is particularly compelling in the present case is that petitioner consented in 1981 to a private reprimand for violating the standard of "offensive personality," a violation of Wis. SCR 20:8.4(g), for just the same kind of misconduct committed in this case, to wit: asking a female client explicit questions about her sexual behavior.[3]

Certainly, petitioner, having already been disciplined for the same type of conduct, should be aware that his conduct could result in discipline. This case presents the same situation as this Court faced in *Arnett v. Kennedy*, 416 U.S. 134 (1974), where the petitioner's

> contention then boils down to the assertion that although no constitutionally protected conduct of his own was the basis for his

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[3] See the report of the referee (P-Ap. 92).

> [revocation] on [the board's] version of the facts, the . . . language in question must be declared inoperative, and a set of more particularized regulations substituted for it, because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so.

Id. at 163.

This Court rejected that approach in *Arnett* and should reject it here. Since petitioner's own conduct was of the type which reasonable attorneys should be aware constitute misconduct, this petitioner's revocation based on that conduct is not "vulnerable on the ground that [it] threatens the constitutionally protected conduct of others." *Colten v. Kentucky*, 407 U.S. at 111.

CONCLUSION

Petitioner's revocation based on the standard of conduct set forth by the Wisconsin Supreme Court in *State v. Heilprin* did not violate the Due Process Clause of the Fourteenth Amendment. Neither that standard nor the "offensive personality" standard of the attorney's oath is unconstitutionally vague.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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